STATE OF WISCONSIN CIRCUIT COURT SAWYER COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 04-CF-141

CHAI S. VANG,

Defendant.

STATE'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

INTRODUCTION

The defendant, Chai S. Vang, has moved this court for an order to change the place of trial or, alternatively, to bring in a jury from another county (Defendant's "Motion for Change of Venue"). As grounds for this motion, Vang cites to extensive media coverage of this case and argues it would be impossible to receive a fair trial in Sawyer County. (*Id.*) Because Vang fails to meet his burden of showing that he would be unable to receive a fair trial with a jury from Sawyer County, this court should deny Vang's motion.

Vang seeks a change of venue based upon pretrial publicity and other factors unrelated to publicity. In this latter category, Vang suggests that some community prejudice exists based on memorial services and fundraising for the victims, and racial and cultural overtones of the case. Vang appears to analyze these separate claims under the single rubric of prejudicial pretrial publicity. For example, his motion requests a change of venue based only on "excessive pretrial publicity" (Defendant's motion at 6). Vang has not produced sufficient evidence to support his

motion for a change of venue on either pretrial publicity or other grounds. The state respectfully requests this court deny his motion.

ARGUMENT

I. PRINCIPLES OF LAW GOVERNING CHANGE OF VENUE.

There are legal principles that address the issue of community prejudice in general. In addition, there are unique principles that govern the analysis of motions predicated on pretrial publicity.

A. General Principles.

Wis. Stat. § 971.22(1) provides that a defendant may request a change of venue "on the ground that an impartial trial cannot be had in the county." A defendant's motion must be supported by affidavit "which shall state evidentiary facts showing the nature of the prejudice alleged." Wis. Stat. § 971.22(2). A court may order a change of venue if it finds the existence of "such prejudice that a fair trial cannot be had. . . ." Wis. Stat. § 971.22(3).

The trial court's decision on a motion for change of venue is a discretionary decision based upon the evidence presented and the unique vantage point of the court.

> The difficulty of impressing upon the record a true concept of the public sentiment in the county is manifest. Just as the trial judge is in a better position to weigh the testimony of witnesses who appear before him, so is he in a better position to judge of the public sentiment of the county. He is on the ground and in a position to sense, in a way that this court cannot, the true sentiment of the community and to judge much more correctly whether it is such as to prevent a fair trial on the part of the defendants.

State v. Kramer, 45 Wis. 2d 20, 29, 171 N.W.2d 919 (1969), quoting *Krueger v. State*, 171 Wis. 566, 575, 177 N.W. 917 (1920).

While actual prejudice need not be shown, "there must be a showing of a reasonable probability of prejudice inherent in the situation." *Gibson v. State*, 55 Wis. 2d 110, 120, 197 N.W.2d 813 (1972). A defendant must produce "evidence, not merely allegations, that such a 'reasonable likelihood' of prejudice exists." *Garcia v. State,* 73 Wis. 2d 174, 190, 242 N.W.2d 919 (1976). A court's decision "must rest upon consideration of the evidentiary matter presented." *Briggs v. State*, 76 Wis. 2d 313, 325, 251 N.W.2d 12 (1977); also *McKissick v. State*, 49 Wis. 2d 537, 545, 182 N.W.2d 282 (1971); *Kramer,* 45 Wis. 2d at 30. Any doubts that exist after considering the evidence should be resolved in favor of the defendant. *McKissick,* 49 Wis. 2d at 545. However, "vague allegations . . . and inconclusive evidence thereof do not make a showing that the community was so infected with passion and prejudice as to make it likely that a fair trial could not be had." *State ex rel. Hussong v. Froelich*, 62 Wis. 2d 577, 593, 215 N.W.2d 390 (1974).

The "reasonable likelihood" that a fair trial is impossible absent a change of venue is reserved for cases "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to . . . fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

B. Principles Applicable to Pretrial Publicity.

Where a request for a change of venue is premised on pretrial publicity, a court is to consider a variety of factors. Factors that are relevant to a pre-trial determination for a change of venue include: 1) the inflammatory nature of publicity regarding the crime; 2) the degree to which adverse publicity permeated the area; 3) the timing and specificity of the publicity; 4) the

participation of the state in the adverse publicity; and 5) the severity of the offense charged. *State v. Messelt*, 178 Wis. 2d 320, 327, 504 N.W.2d 362 (Ct. App. 1993).[1]

II. DEFENDANT'S MOTION FAILS TO SHOW THAT THE PRETRIAL PUBLICITY IS PREJUDICIAL.

While the defendant cites the factors that are to be considered in ruling on a motion for change of venue, he fails to discuss the key factor of whether the publicity is prejudicial. "Without the nature of the publicity concerning the crime demonstrated by evidence in the record, there is no way for this court to determine its 'inflammatory nature,' the first of the factors to be considered. . . ." *Kutchera v. State*, 69 Wis. 2d 534, 549, 230 N.W.2d 750 (1975), quoting *State v. White,* 68 Wis. 2d 628, 635, 229 N.W.2d 676 (1975). The defendant's motion and supporting affidavit consists of general statements relating to the memorial services and fundraising for the victims, racial and cultural overtones, the extent of publicity, the state's participation in the publicity and the severity of the charges, and recites and attaches copies of news reports regarding the case. The motion and supporting affidavit presume that publicity in and of itself equates with prejudice.[2] It does not. The defendant gives few examples of prejudicial publicity and makes conclusory allegations of community prejudice. As stated above, such vague allegations of improper and prejudicial pretrial publicity and inconclusive evidence do not establish a need to change venue.

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[1] There are other factors relevant to the inquiry that apply only during jury selection or after trial. These include the degree of care exercised in jury selection, the amount of difficulty encountered in jury selection, the extent to which jurors are familiar with the publicity, the defendant's use of peremptory and for cause challenges and the nature of the verdict returned. *State v. Albrecht*, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). At this stage of the proceeding these factors do not apply.

[2] While the defendant has attached text of some news articles to his motion, many of the attachments are simply lists of news articles that have appeared rather than the articles themselves.

A. The Inflammatory Nature of the Publicity.

Under Wisconsin law, change of venue becomes an issue only where pretrial publicity is prejudicial or inflammatory. Vang asserts that "much of the pretrial publicity is adverse to the defendant and includes matters that otherwise may not be admissible at trial. . . ." (Vang's motion at 4). However, adverse publicity is not the standard. The examples of press coverage that Vang proffered in support of his requests to change venue reflect that the pretrial publicity was predominately informational and not inflammatory.

While the reporting of many serious criminal cases may arouse strong emotion, that alone does not warrant a change of venue. *Froelich*, 62 Wis. 2d at 594 (slaying and decapitation of game warden); *State v. Hebard*, 50 Wis. 2d 408, 184 N.W.2d 156 (1971) (murder of five family members by other family member); *Tucker v. State*, 56 Wis. 2d 728, 202 N.W.2d 897 (1973) (Defendant charged with murder and nine counts of attempted murder for death of police officer and wounding of three other officers during Milwaukee race related riots); *Hoppe v. State*, 74 Wis. 2d 107, 111-12, 246 N.W.2d 122 (1976) ("It is apparent that crimes of this nature (rape and murder, and rape and attempted murder of two college women) would make a substantial impact upon the community. . . ."); *Briggs*, 76 Wis. 2d at 327 ("It is difficult to report on a shooting death which occurred incident to an armed robbery of a tavern without arousing strong emotion."); *Holland v. State*, 87 Wis. 2d 567, 577, 275 N.W.2d 162 (Ct.App. 1979) ("While the nature of crime itself was somewhat inflammatory, the news reports did not add to this in any . . . objectionable way."). A change of venue will not ameliorate the emotional impact that this case may generate among jurors.

The mere fact that a case has been covered extensively in the media is not a sufficient basis to justify a change of venue.

> It is not required, however, that the jurors be totally ignorant of the facts and the issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961); *Also see State v. Beavers*, 63 Wis. 2d 597, 613, 217 N.W.2d 307 (1974). Finally, in even more explicit terms the Supreme Court stated after reviewing its prior cases:

> Taken together, these cases demonstrate that pretrial publicity - even pervasive, adverse publicity - does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity. . . .

Nebraska Press Association v. Stuart, 427 U.S. 539, 554 (1976). The Supreme Court has emphasized that the existence of extensive publicity does not equate with unfairness:

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received . . . extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and ask us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere . . . utterly corrupted by press coverage." One who is reasonably suspected of murdering his children cannot expect to remain anonymous.

Dobbert v. Florida, 432 U.S. 282, 303 (1977) (citation omitted). Also see *Holland*, 87 Wis. 2d at 575 (Court rejected argument that informational news reports can become inflammatory when they are frequent, detailed and recent).

While the charges against Vang have received extensive publicity in local, state and national media, that alone does not warrant a change of venue. Indeed, the extensive nature of

the publicity suggests that the same issues may arise regardless of from where a jury is ultimately selected. Nor has the defendant shown that the publicity that has occurred has "utterly corrupted" the trial atmosphere such as to constitute a constitutional violation.

The relevant question is not whether the community remembers the case but whether it has such fixed opinions that it can not impartially judge the guilt of the defendant. *Irvin*, 366 U.S. at 723; *Patton v. Yount*, 467 U.S. 1025, 1029-30 (1984) (Change of venue not required despite fact that all but two of 163 potential jurors had heard about the case and 77% admitted that they would carry an opinion into the jury box and eight of the fourteen jurors and alternates selected admitted that at some point they had formed an opinion as to the defendant's guilt where jurors stated they could set opinions aside); *Beavers*, 63 Wis. 2d at 613. The Wisconsin Supreme Court has upheld a denial of a change of venue involving the sexual assault, murder and attempted murder of two college students where "[i]t is apparent that crimes of this nature would make a substantial impact upon the community and would be the subject of extensive media coverage" and "the likelihood that the community and the prospective jurors would be informed about the general nature of the crimes and some of its specifics was very high." *Hoppe*, 74 Wis. 2d at 111-12. As stated in *Murphy*:

> We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.

Murphy, 421 U.S. at 800 n.4.

Based upon these principles, courts have consistently and repeatedly concluded that it is the nature of pretrial publicity that must be reviewed. Where reporting is predominantly

objective, informational and noneditorial, it is not considered prejudicial. *Gibson,* 55 Wis. 2d at 120-21; *Albrecht*, 184 Wis. 2d at 306; *Holland*, 87 Wis. 2d at 577; *Briggs, 76 Wis. 2d* at 327; *Hoppe*, 74 Wis. 2d at 112; *Froelich,* 62 Wis. 2d at 594; *Thomas v. State*, 53 Wis. 2d 483, 492, 192 N.W.2d 864 (1972). It is not required that jurors be totally ignorant of the facts and issues involved in a particular case. *Tucker v. State,* 56 Wis. 2d at 736.

> Uneditorialized news of purely informational nature may inform possible members of a jury but such news does not necessarily create prejudice. An informed jury is not necessarily a prejudicial one. There is no claim here of editorialized news, of rabble rousing, or of an attempt to form public opinion against [the defendant].

Thomas, 53 Wis. 2d at 492. *See also Messelt*, 178 Wis. 2d 320 (finding no prejudice despite extensive news coverage including headlines, "Rapist Should Be Behind Bars For A Long Time"); *Hoppe*, 74 Wis. 2d at 112-13 (Predominate tone of reports were objective and informational despite articles referring to sensitivity of case, a police officer stating that people might be tempted to shoot the defendants, and a comment from the dean of students that the police "don't make mistakes" and "if I could get my hands on the men who did it, I'd wring their necks. There's the same sort of feeling in the community"). Publicity is prejudicial when it is incendiary, editorializes, is designed to arouse or inflame community prejudice against a defendant, or amounts to "rabble rousing." *Briggs*, 76 Wis. 2d at 327; *Albrecht*, 184 Wis. 2d at 306-307; *Holland*, 87 Wis. 2d at 578; *Froelich,* 62 Wis. 2d at 594; *Thomas,* 53 Wis. 2d at 492.

On the face of his motion, Vang seems to be arguing that if a jury has knowledge of the facts of a case, it is a prejudiced jury. The courts have held otherwise. Absent a strong showing of prejudice, Sawyer County citizens should not be deprived of their right to preside as jurors over crimes occurring within their county. While Vang may seek an uninformed jury, he is not entitled to one. The constitution only guarantees him an unbiased jury.

With the above principles in mind, the state will now address the specific issues Vang raises. He cites to the following articles or excerpts:

1. A statement of Birchwood Police Chief Peter Weatherhead in which he was quoted as saying the victims "were basically ambushed." (Affidavit at para. 9).

The article in question appeared in the Spooner Advocate on December 1, 2004. This was an isolated comment and it has not been repeated. Considering that many of the victims were shot in the back the statement is not inaccurate.

2. A statement of a local chief of police stating that the investigation was "traumatic," that he saw trespassing becoming more of a problem and that landowners deserve to have their rights respected (Affidavit at para. 10).

The statement that the investigation was "traumatic" is not the type of publicity considered inflammatory. The statement was published on December 8, 2004, in the Spooner Advocate. It cannot be disputed that any reasonable person, including a juror, would find such an investigation traumatic. The article does not attempt to inflame the community against the defendant.

3. An interview by Jeremy Peery of the DNR where he detailed the circumstances of the defendant's arrest and said "we'll all be in a state of shock and grief here for a long, long time." (Affidavit at para. 11).

Neither the article in general nor the specific quote is inflammatory. The article appeared in the February 2005 edition of *Field and Stream*. Vang has not provided any information as to the circulation of this magazine in Sawyer County. The only comment he cites, which refers to the shock and grief over the incident, is simply an expected and normal human reaction.

4. Various media reports (dates) referring to the events as "the Columbine of the Northwoods" and the areas "Own 9/11." (Affidavit at para. 12).

The articles attached by Vang reflect that these statements were isolated phrases and were made in the first few weeks after the incident. The articles themselves do not attempt to compare

the defendant to the persons involved in those cases. The primary focus of the articles was on the sense of loss in the victims' community in Barron County.

5. Victim support at Packer game by the wearing of hunter orange (Affidavit at para. 18).

Support of victims does not imply prejudice. The game was a Monday night game on November 29, 2004. Vang states that as the game was not a Milwaukee season ticket holder game it was more likely to have been attended by individuals in northern Wisconsin.[3] However, the defendant has not shown that this game was attended by an inordinate number of Sawyer County residents. The game was nationally televised and was presumably watched by fans across the state of Wisconsin, including Milwaukee and the southern part of the state. Even with any show of support for the victims, the relevance of this game to the motion for change of venue is unclear. To the extent that it is relevant, it merely shows that persons in all parts of the state were exposed to this support.

6. Articles referencing funerals and fundraising for victims (Affidavit at paras. 16-24).

The articles in question indicate that the community's emotions had been properly focused on remembering the victims and expressions of sorrow rather than lashing out against the defendant. Such expression, because it occurred primarily in Barron County, does not indicate improper prejudice against the defendant. In addition, the media reports reflect that the defendant's own family expressed sympathy and condolences to the victims as did Hmong community leaders.

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[3] Vang states that attendees were encouraged to wear hunter orange to show support for the victims. However, it is well recognized that in November and December of every year Packer game attendees regularly wear hunter orange to games.

One article references a local rodeo rider who indicated that he would donate money to the victims' fund. The article appeared on December 8, 2004, and does not vilify Vang or attempt to inflame public opinion.

Courts in other cases involving press coverage of such events have found that change of venue was not warranted even though in some of those cases the publicity was similar. In *Commonwealth v. Morales*, 800 N.E.2d 683, 687 (Mass. 2003), the defendant was captured five days after allegedly killing a police officer. Finding no error in not changing venue, the Massachusetts Supreme Court wrote:

> The [pretrial] coverage frequently did mention the defendant's confession, his criminal record, and the fact of the victim's twenty-one year service as a police officer, his popularity in the community, and the memorials in his honor. These references, however, are "significantly short of the type of emotionally charged, inflammatory, sensationalistic coverage needed to support a presumption of prejudice."

Id. Similarly, in *People v. Daniels*, 802 P.2d 906, 919 (Cal. 1991), which involved the killing of a police officer, it was noted that three months before trial, the school board debated a proposal to rename a football stadium for the slain officer, and one month before trial, outside the courthouse where the case was tried, the county unveiled a statue commemorating police officers. *Id.* at 920. Nevertheless, the California Supreme Court upheld decisions not to change venue both before and after *voir dire*. *Id.* at 921-22.

In this case none of the articles expressed any attitudes towards Vang or constituted rabble-rousing or attempts to arouse community passion or prejudice against him.

7. Articles detailing the allegations against Vang (Motion at 4).

Objective and informational news reports are not inflammatory. These articles made clear that they were based on either the probable cause statement or the criminal complaint filed against the defendant.

Vang makes reference to multiple articles referencing a "chronology" of the case which serves to refresh the memories of persons whose memories may have faded (Defendant's motion at 6). However, the only chronologies the state is aware of are brief, factual and dispassionate summaries of the offense and the various activities and court proceedings that have occurred in the case ("*Timeline of Events*," Sawyer County Record, December 2, 2004). As the caselaw provides, awareness of the facts of a case by potential jurors does not itself warrant a change of venue.

8. Articles referencing the defendant's purported statement (Motion at 4).

There have been news articles detailing Vang's statements as they have appeared in various publicly filed documents such as the probable cause statement and the criminal complaint. The reports have simply set forth his version of events and that of the surviving victims. The publication of accurate information from a criminal complaint and preliminary hearing is not prejudicial absent a showing of intent to inflame or arouse a community against a defendant. *Messelt*, 178 Wis. 2d at 330.

In addition, if such statements are found admissible at trial, the fact that they were reported does not itself warrant a change of venue. *See, e.g., State v. Ritchie*, 2000 WI App 136, ¶ 25, 237 Wis. 2d 664, 676, 614 N.W.2d 837 (finding no error in denying change of venue where "most of the information, which [the defendant] contends was inflammatory, was made known to the jury during trial"); *Tucker*, 56 Wis. 2d at 734-35 (change of venue not warranted where publicity regarding defendant's statement not inconsistent with courtroom testimony); *Hebard*, 50 Wis. 2d at 427-28. The defendant's attorneys have also been quoted saying "This certainly does not seem to be a whodunit. It seems to be a Why?" (*Vang's attorneys speak on 'tragedy'*, St. Paul Pioneer Press, November 29, 2004). At this time it does not appear that the reporting on any confession of the defendant would cause a prejudicial conflict with any trial testimony. *Tucker*,

56 Wis. 2d at 734 (Publicity regarding defendant's statement not inconsistent with courtroom testimony as issue at trial was why defendant shot and not whether he shot).

9. Vang's background (Motion at 4).

Based on the state's review of information reported on the defendant's background, there is nothing inflammatory. Many of the articles make favorable references to the defendant as a respected person, a shaman and a community leader.

10. Other alleged violations of law and conflicts with other hunters (Motion at 4).

Isolated references to a defendant's background, criminal record, suspected connections with other crimes and other information that may not be admitted in evidence at trial does not compel a finding of inflammatory publicity warranting a change of venue. *Murphy v. Florida*, 421 U.S. at 799 ("exposure to information about a state defendant's prior convictions" does not alone deprive a defendant of due process); *Patton*, 467 U.S. at 1029 (No presumed prejudice where publicity revealed prior conviction for murder, confession to crime and other information not admitted at trial); *Whitehead v. Cowan,* 263 F. 3rd 708, 719-20 (7th Cir. 2001) (Change of venue not warranted despite publicity regarding defendant's request for death sentence, prior criminal record and suspected involvement with unrelated child abduction case); *Hoppe*, 74 Wis. 2d at 113-14 (Publicity regarding convictions for unrelated conduct did not provide a basis for a change of venue); *Holland*, 87 Wis. 2d at 578 (change of venue not warranted where jurors aware of co-defendant's conviction for same offenses).

A few articles have reported on assertions that Vang was arrested in Minneapolis in 2001 for a domestic incident relating to his wife and involving a gun. In addition, it was reported that in 2002 in Green Lake County, Wisconsin, Vang was cited for trespass while hunting and failed to appear in court which resulted in an arrest warrant for failure to appear or pay a fine. In regard to

alleged conflicts with other hunters, the state assumes Vang is referring to a few articles that speculated on whether he was connected to a homicide of another hunter that occurred in 2001 in Clark County.

The articles reporting the alleged domestic incident were limited in scope and did not indicate that Vang was charged or convicted of any offense. In fact, he was not. The trespassing violation did not involve any violence or inflammatory information. These two examples, even combined, are certainly less prejudicial than the information found insufficient for a change of venue in the cases cited above. In regard to a possible connection to a prior unsolved homicide, the article merely suggested the possibility and was based on speculation ("*Vang of Interest in Clark Cty*," Spooner Advocate, December 8, 2004). While the article attempted to make several comparisons between the cases, no specific assertions were made. The article noted that the defendant was simply "of interest" in the matter. *Id.* No person associated with this prosecution ever suggested that Vang was connected with that matter. Such vague information, which apparently has not been repeated since early December 2004, is certainly less potentially prejudicial than the more serious claims made in other cases which were found to be insufficient for a change of venue.

11. Racial/cultural issues (Affidavit at paras. 25-30).

The defendant also alludes to the "the racial and cultural issues" that exist in this case and publicity reflective of those issues. While a number of press reports deal with the issue of race, the reports are not inflammatory. Many articles deal with broader issues of race relations and, while they cite this case as a possible example of racial tensions, the reports cannot be considered efforts to inflame potential jurors. In fact, they can more accurately be seen as educating and sensitizing the public to race issues. In addition, there are various articles that quote both defense counsel and

the attorney general saying the case reflects the actions of a single individual and the race of the defendant should not be an issue (*Vang pleads not guilty,* Haywardwi.com, January 5, 2005), . Hmong community leaders in Wisconsin and Minnesota have also spoken out against injecting race into the case. (*Hmong leaders decry shooting,* JSonline.com, November 23, 2004); *Damage control: Minnesota Hmong reach out after hunter shootings,* GreenBayNewsChron.com, December 2, 2004. Theresa Hesebeck, whose brother was killed and husband wounded in the incident, wrote on a Web site created in memory of the victims, "I would like to ask that anyone who is trying to make this a racial issue, either white or minority, please stop this and know that it is a dishonor to all of our loved ones to continue these acts of prejudice. If you are not of Native American blood, we are all immigrants. Please be sympathetic to the Hmong community who is also saddened by all of this." (*Theresa Hesebeck not asking too much,* LeaderTelegram.com, December 21, 2004). State Senator Jauch has also spoken out against "knee jerk responses." *(Jauch calls for careful consideration in response to hunting incident,* (Sawyer County Record, December 8, 2004). The articles do not suggest Vang's race should play a part in reaching a verdict, that he is guilty solely because of his race, or that Vang likely did the shooting because of race. In short, the articles do not reflect any prevailing community sentiment against Vang based on race, nor do they incite such sentiment.

12. Costs of trial (Motion at 7).

Vang also cites an article in the Sawyer County Record discussing the cost of a trial. The article appeared on December 8, 2004 (*The cost of justice: County staff, elected officials begin assessing cost of high profile cases*, Sawyer County Record). The story does not suggest that Vang is not entitled to a trial or otherwise attempt to inflame public opinion. In fact, the amount of money discussed is relatively minor. The article simply states the obvious, commonly-known fact -- trials

cost money. Furthermore, an adverse opinion on the costs of a trial may very well exist among any juror, in any case, in any county and is not unique to Sawyer County. The article notes that the cost of a trial is just a small part of the cost to taxpayers when one considers the salaries of judges, court reporters, prosecutors, etc. A concern over such costs may exist anywhere. Viewed as a whole, there is nothing inflammatory about this article.

The above discussion demonstrates that the predominate tone of the pretrial publicity is informational and objective and does not constitute rabble rousing or attempts to inflame public opinion against Vang.

B. The Timing And Specificity of the Publicity.

The offenses occurred on November 21, 2004. The defendant made an initial appearance on November 30, 2004, and waived his preliminary hearing on December 29, 2004. It is undisputed that between November 21, 2004, and November 30, 2004, there was considerable publicity regarding the case in local, state and national print and broadcast media. Defendant, in his motions, has only submitted information published by newspapers. The state asserts that the coverage by television and radio news reports will contain less detail than the newspaper reports. The great bulk of this publicity occurred during a two week period between November 21, 2004, and shortly after the filing of the criminal complaint and the initial appearance on November 30, 2004. There was another flurry of news reports surrounding the defendant's preliminary hearing. However, within days after the preliminary hearing the publicity greatly subsided and since that time has focused simply on the filing of various defense motions and the scheduling of court dates. Since early January 2005, these articles have been sporadic, and Vang does not suggest that the articles contained any inflammatory or prejudicial information. While additional media coverage can be expected in June 2005 during scheduled motion hearings, the motions for hearing at that time are

not likely to generate any prejudicial information emanative from the hearings. While the admissibility of Vang's statements will be one issue at that hearing, the substance of any such statements will not.

Courts have recognized that the effect of any actual or potentially prejudicial news reports may dissipate over time. *Hoppe*, 74 Wis. 2d at 114. In *Hoppe,* the court noted that while the news articles were not favorable to the defendant, they were not inflammatory. *Hoppe*, 74 Wis. 2d at 113-14. The court also stated that most of the articles were published in the fourteen days immediately after the crimes were committed and almost four months had elapsed from that coverage to the trial. *Hoppe*, 74 Wis. 2d at 114. Even if prejudice is found to exist, such prejudice can be ameliorated or cured with the passage of time. *Hoppe*, 74 Wis. 2d at 114; *Messelt*, 178 Wis. 2d at 330 (six-month break before trial in coverage of sexual assault of elderly woman); *Turner*, 76 Wis. 2d at 28 (five-month break in coverage of sexual assault-murder of young girl); *Jones v. State*, 66 Wis. 2d 105, 111, 223 N.W.2d 889 (1974) (four-month break in coverage of attack on prison guard); *Schenk v. State*, 51 Wis. 2d 600, 609-10, 187 N.W.2d 853 (1971) (three month lapse between alleged prejudicial publicity and trial); *Tucker*, 56 Wis. 2d at 735 (six-to-seven-month break in coverage of officer's murder).

In this case, the publicity to which the defendant objects occurred for an approximately five week period, ceasing as of early January 2005. The trial is currently scheduled for mid-September 2005. This eight month lapse of time is several months longer than time lapses that the Wisconsin Supreme Court has found significant for affirming decisions denying venue changes.

C. State's Participation in the Adverse Publicity.

Vang concedes that the state has avoided commenting on this case to the media (Defendant's motion at 8). His attorneys have also conducted themselves with discretion and

restraint. However, Vang also asserts that the state has contributed to the availability of facts regarding the case by posting case documents on its website (Defendant's motion at 8; Affidavit at paras. 6-8). Vang mistakenly asserts that this includes his signed statement (Affidavit at para. 8). Finally, Vang claims that the involvement of the attorney general as lead prosecutor will heighten media attention (Defendant's motion at 8).

The state, mindful of its legal and ethical obligations, has refrained from commenting on the case. The state has limited its comments to the content of publicly filed documents. Those comments have been generally limited to directing reporter's attention to such documents. Vang admits that he cannot show that the information posted on the DOJ website has been accessed by any Sawyer County residents, or even accessed more by Sawyer County residents than residents of other counties. In any event, the posted documents are merely those already part of the public record without any editorial comment. Posting the public documents does not suggest any intent to inflame public opinion against the defendant or constitute disclosure of inflammatory or prejudicial information. The media and members of the public commonly make inquiries to the prosecutor for documents which are public records.[4] This practice is not unusual in cases where there is media interest.[5]

The defendant is mistaken in alleging that the state has posted any signed statement of the defendant on its Web site. The "signed statement" on the site is actually the probable cause

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[4] According to a local weekly, Sawyer County Clerk of Court has had difficulty responding to requests for information and copies of documents. *The cost of justice: County staff, elected officials begin assessing cost of high profile cases*, Sawyer County Record, December 8, 2004.

[5] For example, the District Attorney prosecuting Michael Jackson has various documents available on his website. http://www.countyofsb.org/da/press.asp. The sheriff in that matter also has documents posted online. http://www.sbsheriff.org/mj/index.html. In addition, in the Kobe Bryant case the court itself posted documents on its website. http://www.courts.state.co.us/exec/media/eagle/courtdocuments.htm.

statement signed by Sawyer County Sheriff's Department Investigator Gary Gillis. This document was filed in court and hence is a public record.

The attorney general has an obligation to the public to perform her duties as provided by law and to keep the public informed as to those duties.

> The attorney general is a high constitutional executive officer. [S]he is an important law-enforcement officer of the state. In a broad sense [s]he is the attorney for our body politic. [S]he should be allowed sufficient latitude to inform the public as to [her] activities in matters of great public concern. This right, however, should be exercised with circumspection so as not to prejudice or impair the rights of a defendant in either prospective or pending litigation.

State v. Woodington, 31 Wis. 2d 151, 167, 142 N.W.2d 810 (1966). The attorney general has acted consistent with those principles. The fact that the attorney general is the lead prosecutor simply has no bearing on whether there has been any inflammatory publicity. Counsel for Vang have themselves stated that had the attorney general not become involved in the case, she would have been criticized and "After all, she is the elected prosecutor who leads the (state) justice department. I can't imagine another case that has more statewide interest or impact, and nationwide for that matter. So it certainly seems logical she would be involved." "*Vang pleads not guilty*," Haywardwi.com, January 5, 2005.

Other than the brief comments very early on by law enforcement officers, the state has not participated in any of the publicity objected to by the defendant.

D. Severity of the Offense Charged.

The defendant is charged with multiple counts of First Degree Intentional Homicide and Attempted First Degree Intentional Homicide. However, the seriousness of the crimes alone does not warrant a change of venue and is only one factor to consider. *Froelich*, 62 Wis. 2d at 595. In addition, the seriousness of the offense is the least compelling factor in a motion for change of

venue. *Ritchie*, 2000 WI App 136, ¶ 24. It is usually a case involving serious crime, such as homicide, that generates public and media interest. Motions to change venue in other cases have been denied where the offenses involved have been serious. *Froelich*, 62 Wis. 2d at 594 (slaying and decapitation of game warden); *Hebard*, 50 Wis. 2d 408 (murder of five family members by other family member); *Hoppe*, 74 Wis. 2d at 111-12 (rape and murder and rape and attempted murder of two college women); *Briggs*, 76 Wis. 2d at 327 (murder of store owner during robbery).

Vang has not shown that any of the publicity up to this time was prejudicial or inflammatory. The news reports were not incendiary, editorializing, or designed to arouse community prejudice. The reports were not intended to inflame or arouse community feeling against the defendant and did not amount to "rabble rousing." To the extent that any prejudice exists, any potential effect will be reduced by the time of trial.

E. Other Factors.

There are other factors which are relevant to deciding Vang's motion for a change of venue.

First, neither Vang nor the victims are residents of Sawyer County. In fact, the events the defendant finds objectionable, the funerals and memorial services, occurred in the home county of the victims, Barron County. Although two of the victims were Sawyer County property owners, they did not live or work in Sawyer County. In *State v. Nutley*, 24 Wis. 2d 527, 429 N.W.2d 155 (1964), the court noted that a strong desire to do justice for crime victims whom jurors may know because of their residence in the county could result in prejudice to the defendant. *Id.* at 541. As the victims have no direct or extensive connection to Sawyer County, potential jurors are less likely to harbor such feelings based on personal relationships with the victims.

Second, much of the publicity cited by Vang has appeared in many media outlets, including newspapers, radio and television, throughout Wisconsin. Vang suggests there has been much less

coverage of the case in the southern part of the state. However, a review of articles published by the Milwaukee Journal Sentinel reflects substantial, yet equally factual, coverage of the case. Milwaukee television and radio stations were also present at the crime scene and at the court appearances. Similarly, the matter was also the subject of considerable news coverage by Madison area media. Indeed, every corner of the state was subjected to extensive reporting by print and broadcast media. Therefore, many of the allegedly prejudicial aspects of the media coverage in this matter, claimed prejudicial by the defendant, will similarly exist in every county.

Third, the publicity Vang cites appeared in many different newspapers and media outlets not only in Wisconsin but throughout the nation. It is unreasonable to conclude that Sawyer County residents have read or listened to all of the media coverage. It is also unlikely that Sawyer County residents viewed or heard radio or television accounts emanating from outside the county's broadcast area. Many newspaper and magazine articles originating outside the area likely had little or no circulation in Sawyer County. It is also speculation to think that most or all people in Sawyer County have read every article regarding this case or that they may recall certain details of any specific article. *Beavers*, 63 Wis. 2d at 615. While the parties to this proceeding have certainly immersed themselves in the details of the various news reports, that does not mean potential jurors also have done so. It is unlikely that potential jurors will remember specific words used in headlines or news articles. As one trial judge noted in rejecting a motion for a change of venue, "[L]awyers and judges have a misimpression that everyone knows what is going on in a courtroom." *Kutchera,* 69 Wis. 2d at 548. Ultimately, the question is not just to what publicity a potential juror may have been exposed, but, what that potential juror might remember, whether the potential juror believes that publicity, and how that might impact on the juror's impartiality.

Fourth, Vang also alludes to the effect of deer hunting on the economy. (Defendant's motion at 6). However he never clearly articulates how this would translate into community prejudice against him. Last year the state issued 649,955 deer hunting licenses.[6] While certainly some of these hunters are from out of state, that number represents 12% of Wisconsin's 2000 census population.[7] When one factors in the family and friends of these hunters it is reasonable to assume that a very large percentage of Wisconsin residents have a tie to deer hunting. This connection to deer hunting will exist throughout the state and will not necessarily be reduced by a change of venue.

Last, the court and the parties will be able to thoroughly *voir dire* any potential jurors. Properly conducted *voir dire* can determine which individuals have read and recall any publicity and whether they can put aside any previously formed opinions in rendering a verdict. *Briggs v. State,* 76 Wis. 2d 313, 325, 251 N.W.2d 12 (1977) (Change of venue is not the only method of guaranteeing a fair trial; other methods include *voir dire*).

In sum, the mere existence of extensive publicity is not a basis to change venue. The defendant has not met his burden of proving a reasonable likelihood of an unfair trial based upon inflammatory pretrial publicity. Isolated portions of a few articles may be termed inflammatory, but there is no pattern of inflammatory publicity that has utterly corrupted the trial process.

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[6] *"Gun deer season is safest on record for shooting accidents,"* Milwaukee Journal Sentinel, November 30, 2004. http://www.jsonline.com/news/state/nov04/279936.asp.

[7] 2000 census WI population: 5,363,675: http://www.doa.state.wi.us/demographic/rcounty_view.asp.

III. THE DEFENDANT HAS NOT ESTABLISHED THE EXISTENCE OF ANY PREJUDICIAL COMMUNITY SENTIMENT.

The defendant has raised two other grounds, independent of any pretrial publicity, in support of his claim that there is a reasonable probability of community prejudice against the defendant that would require a change of venue.

A. Community Actions.

Vang asserts that memorial services and forums relating to the victims, the making of donations for the victims, and the flying of flags at half staff in memory of the victims, has "created a bond" between the victims and potential jurors such that "potential jurors would have an emotional, if not financial, investment in the outcome of the trial. . . ." (Defendant's motion at 4; Affidavit at paras. 15-24).[8] As stated elsewhere, a homicide case will often result in an emotional reaction by jurors in any county. Vang's family and Hmong community leaders in both Wisconsin and Minnesota have also expressed their sympathy and condolences to the victims and have even encouraged people to donate money to the victims. (*Damage Control: Minnesota Hmong Reach Out After Hunter Shootings*, GreenBayNewsChron.com,, December 2, 2004); *Daughter Defends Man Accused In Killings*, DuluthNewsTribune.com, November 29, 2004). Vang has not shown that an overwhelming portion of Sawyer County residents have participated in this conduct. The fact that some members of the community may have donated money to the victims shows only compassion, not prejudice against Vang. The state does not understand how contributions by some

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[8] Vang stresses the fact that some U.S. flags in the area as well as southeastern Wisconsin and eastern Minnesota were lowered to half staff contrary to federal law. This is not uncommon. For example, upon the death or former Green Bay Packer Reggie White, flags were also lowered to half staff. *Packers committed to flag tribute*, JSonline.com, December 28, 2004, http://www.jsonline.com/news/gen/dcc04/288032.asp. The document Vang submitted regarding such practice notes that it is often misused.

members of the community would give them a "financial investment" in the outcome of the trial. Certainly Vang can explore with potential jurors any such donations and whether it will effect their ability to be fair and impartial, but the facts presented do not establish any widespread prejudice or animosity towards the defendant. As noted above, expressions of sympathy and support for the victims, which do not involve the vilification of Vang, are not the type of prejudice that warrants a change of venue.

Some articles have called for restraint. State Senator Bob Jauch was reported to have called for "careful consideration" of the case. "*Jauch Calls For Careful Consideration In Response To Hunting Incident*" Sawyer County Record, December 8, 2004. Senator Jauch was also quoted as "cautioning against and 'knee jerk responses' in the wake of" the incident and calling for a "careful, thoughtful prosecution." To the state's knowledge, the area newspapers have not published any editorials or letters from county residents critical of Vang or attempting to inflame public opinion.

B. Racial and Cultural Overtones.

Vang asserts that "individuals, businesses and organizations have engaged in conduct that is at a minimum racially insensitive if not outright offensive and demonstrative of bias and prejudice towards the defendant, his culture and his counsel." (Defendant's motion at 5; Affidavit at paras. 25-30). The only support for this claim is: 1) An article in the "National Vanguard" making an derogatory reference to defense counsel as being Jewish, and 2) Reference to a flier distributed in Hayward over the weekend of December 25, 2004, describing the defendant as the "Asian Killer" and also making a derogatory reference to the defense counsel as being Jewish (Affidavit at paras. 26-27). The defendant concedes that such attitudes "may well not be reflective of the predominate attitude in Sawyer county" and is "not necessarily indicative or (sic) the overall cultural and racial

attitudes of Sawyer County and the Northwestern region of Wisconsin. . . ." (Affidavit at para. 30; Defendant's motion at 5).

The state rightly condemns such racially based comments as offensive and deplorable. However, Vang has offered no evidence that such attitudes are reflective of any portion of the population of Sawyer County. Vang has not demonstrated, nor does the state believe he can demonstrate, that these attitudes or opinions exist in Sawyer County to such a degree as to impair Vang's right to a fair trial.[9] In addition, the "National Vanguard" is not published in Wisconsin but originates in West Virginia. Vang has not offered any evidence showing how many, if any, citizens of Sawyer County subscribe to this magazine. *Froelich*, 62 Wis. 2d at 594-95 (defendant did not introduce evidence as to the readership in county of magazine that contained alleged prejudicial or sensational information on case). The flyer was also apparently distributed by persons from outside Sawyer County and it states it was issued by a Michigan group which is affiliated with the "National Vanguard."[10] There is no evidence that the creation or distribution was done by Sawyer County residents. While Vang concedes that he does not know how many such flyers were distributed, he suggests that the court should presume widespread distribution. However, it is Vang's burden to establish the existence of community prejudice based on facts, not speculation. As with the

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[9] In a case involving prosecution for obscenity, the defendant alleged specific examples of conduct directed at him because of the nature of his business. *Court v. State*, 51 Wis. 2d 683, 706, 188 N.W.2d 475 (1971). In upholding the trial court's denial of a motion for change of venue it was stated: "While the evidence in the instant case compels the conclusion that there was some prejudice in segments of the community against persons accused of selling obscene literature, the evidence does not warrant a reversal of the trial court's determination that the community was not so infected with prejudice as to give rise to the reasonable likelihood that a fair trial could not be had." *Id.* at 707. In this case the defendant has offered nothing even approaching such an evidentiary showing.

[10] The National Vanguard is a publication of the National Alliance. In December of 2003 it was reported that the National Alliance membership had declined from 1400 to 800 members and its staff cut. "*Neo-Nazi National Alliance Experiences Troubled Times*," Southern Poverty Law Center, December 2003. http://www.splcenter.org/center/splcreport/article.jsp?aid=60.

National Vanguard article, he has not shown that the attitudes and opinions contained in this flyer reflect the sentiment of Sawyer County residents. Even assuming the flyers were distributed by one or more Sawyer County residents, there is no evidence that "these were the manifestation of the feelings of more than an extremely few aberrant members of the community." *Jones v. State*, 66 Wis. 2d 105, 112, 223 N.W.2d 889 (1974). The mere fact that racist comments have been made by some extremely small number of persons in no way establishes that Sawyer County residents generally hold such views or that they cannot be fair and impartial jurors.[11]

Throughout this case the parties, public officials and community leaders have stressed that race should not play a part in this case. These repeated calls for the case to be decided on the facts reduces the possibility that potential jurors will allow feelings of race to creep into deliberations.

Vang also claims that racially insensitive or offensive attitudes "are not of the type that are readily admitted to by individuals for fear of backlash or a certain stigma society may place upon them" and thus "it is unlikely that such conduct and attitudes will be disclosed during *voir dire*." (Defendant's motion at 5; Affidavit at para. 30). This claim does not establish community prejudice against the defendant. Assuming a reluctance of jurors to admit to prejudicial beliefs or attitudes, this is not unique to Sawyer County and would exist in *any* county in *any* state. Therefore, this does not constitute a basis for a change of venue.

In conclusion, the defendant has not offered sufficient facts to support his claim of community prejudice.

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[11] Vang has also included in his motion excerpts from what appear to be internet discussions on the case relating to race. These excerpts, which are not alleged to involve Sawyer County residents, are simply irrelevant to the motion for a change of venue in this case.

IV. PLACE OF TRIAL.

Should this court conclude that a change of venue is required, the state requests that the actual trial of the matter be held in Sawyer County. The vast majority of witnesses in this matter, as well as the victims' families, reside in the area. With respect to the victims' families, a venue change could potentially impose severe hardship on them. The victims' families live in a neighboring county, a relatively easy daily commute for trial. A trial in another venue would impose severe hardships on the family, including the costs of meals and lodging and additional time away from family and employers. Likewise, local witnesses, including law enforcement officials, would incur expenses associated with additional travel and lodging associated with a trial in another location. Further, these witnesses are unavailable for other responsibilities. It would be an unreasonable burden on the witnesses and family, as well potentially more costly to the county, to actually hold the trial in another county.

CONCLUSION

Under the circumstances, Vang has failed to establish that pretrial publicity in this case will prevent him from obtaining an impartial trial in Sawyer County. Nor has Vang otherwise shown that there exists such community prejudice that a fair trial cannot be had in Sawyer County. This court should deny the defendant's motion for a change of the place of trial or selection of a jury from another county.

Dated this 10th day of May, 2005.

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